Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q–01–56 OF 2000

ABDUL HAMID MOHAMAD, MOHD SAARI AND RAHMAH HUSSAIN JJCA

20 JANUARY 2004

Arbitration — Award — Enforcement — Award of arbitrator — Whether granting of award infringed statutory provisions — Whether award should be set aside — Architects Act 1967, Quantity Surveyors Act 1967, Registration of Engineers Act 1967

Arbitration proceedings were instituted pursuant to an arbitration clause of a consultancy services agreement ('CSA') between Lembaga Amanah Kebajikan Masjid Negeri Sarawak ('the Lembaga') and the appellant. The CSA was subsequently novated by the Lembaga to the respondent. The appeal was against the decision of the High Court in setting aside the award of the arbitrators. The award was set aside on the basis that the appellant (a body corporate) was not an 'architect', 'engineer' or 'quantity surveyor' as defined in the Architects Act 1967, Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967 ('the Acts') and as a result thereof, could not provide the consultancy services and therefore did not have a cause of action based on breach of contract.

Held, dismissing the appeal:

(1) Section 7A of the Acts of Parliament clearly provides that only a body corporate which has a permit from the relevant governing professional bodies can recover 'in any court any fee, charge or remuneration for any professional advice or services'. This is strengthened by provisions in the Acts imposing a penal sanction should there be a violation of s 7A (see paras 27–28).

(2) The claimants were not registered nor approved to practice the disciplines covered by the Acts of Parliament (see para 8).

(3) The award by the arbitrators therefore was clearly against the statutory provisions and the public policy which the enactment of such laws aim to achieve — to regulate the professions involved and to protect the public from unqualified and unregistered engineers, architects or quantity surveyors (see para 31).

[Bahasa Malaysia summary

Prosiding timbangtara telah dimulakan menurut fasal timbangtara dalam perjanjian khidmat perunding ('PKP') antara Lembaga Amanah Kebajikan Masjid Negeri Sarawak ('Lembaga') dan perayu. PKP kemudiannya telah dinovasikan oleh Lembaga kepada responden. Rayuan tersebut adalah terhadap keputusan Mahkamah Tinggi yang mengenepikan award penimbangtara. Award tersebut telah diketepikan atas dasar bahawa perayu (sebuah badan korporat) bukanlah seorang 'architect', 'engineer' atau 'quantity surveyor'

sebagaimana yang ditafsirkan dalam Akta Arkitek 1967, Akta Pendaftaran Jurutera 1967 dan Akta Juruukur Bahan 1967 ('Akta-Akta') dan akibat dari itu, tidak boleh memberikan khidmat nasihat dan oleh itu tidak mempunyai kausa tindakan berdasarkan perlanggaran kontrak.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 7A Akta-Akta Parlimen dengan jelas memperuntukkan bahawa hanya satu badan korporat yang mempunyai permit daripada badan kerajaan professional yang berkaitan sahaja yang boleh mendapat balik 'in any court any fee, charge or remuneration for any professional advice or services'. Ini diperkukuhkan oleh peruntukan-peruntukan dalam Akta-Akta yang mengenakan satu sanksi penal sekiranya terdapat perlanggaran s 7A (lihat perenggan-perenggan 27–28).

(2) Penuntut-penuntut tidak didaftarkan mahupun diluluskan untuk mengamalkan displin-displin yang dirangkumi oleh Akta-Akta Parlimen (lihat perenggan 8).

(3) Award oleh penimbangtara oleh itu dengan jelas bertentangan dengan peruntukan statutori dan polisi am yang mana penggubalan undang-undang sedemikian bertujuan untuk mencapai — mengawalselia profesyen-profesyen yang terlibat dan untuk melindungi masyarakat daripada jurutera-jurutera, arkitek-arkitek dan juruukur-juruukur bahan yang tidak bertauliah (lihat perenggan 31).]

Notes

For cases on enforcement of awards, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 11163–1173.

Cases referred to

David Taylor & Son, Ltd v Barnett [1953] 1 All ER 843 (refd)

Legislation referred to

Architects Act 1967 ss 7, 7A, 34, 39
Interpretation Acts 1948 and 1967s 127
Quantity Surveyors Act 1967 ss 7, 7A, 25, 39
Registration of Engineers Act 1967 ss 7, 7A, 25, 39

Appeal from: Originating Motion No 25–04 of 2000–1 (High Court, Kuching)

Ranjit Singh (Isa Aziz Ibrahim and Tony Ling Lee Tom with him) (HC Lee & Partners for the appellant.
Datuk JC Fong (Susan Gan with him) (Sarawak State Attorney-General) for the respondent.

Rahmah Hussain JCA (delivering judgment of the court):

[1] The appeal before this court is against the decision of the learned High Court judge in setting aside the arbitrators' award dated 22 February 2000.

[2] The arbitration proceedings was instituted pursuant to an arbitration clause (cl 6.03) of a consultancy services agreement dated 26 October 1984 ('CSA') signed between the Lembaga Amanah Kebajikan Masjid Negeri Sarawak ('Lembaga') and Sami Mousawi-Utama Sendirian Bhd ('appellant').

[3] In the light of the pleadings filed by the parties in the arbitration proceedings and at the request of the parties thereto, the arbitrators directed that the following preliminary issue be tried, namely:

> Whether the Claimant (a body corporate) being not an 'Architect', 'Engineer' or 'Quantity Surveyor', as defined in the Architects Act 1967, Registration of Engineers Act 1967 and Quantity Surveyors Act 1967, (respectively) can having regard to ss 7 and 7A of the said Acts, provide in Malaysia, the comprehensive architectural, engineering and quantity surveying consultancy services for the design and supervision of the construction, building and erection of the new State Mosque and related buildings which the Claimant is contractually obligated to provide under the Consultancy Services Agreement dated 26 October 1984. In any event whether the Claimant has a cause of action against the Respondent in respect of its entitlement to fees and other remedies pursuant to the Consultancy Services Agreement dated 26 October 1984 in the light of the provisions of the Architects Act 1967, Registration of Engineers Act 1967 and Quantity Surveyors Act 1967 (hereinafter referred to as the 'Preliminary Issue').

[4] The three learned arbitrators, had on different grounds, answered the preliminary issue in the affirmative — with two arbitrators finding that there was no breach of ss 7 and 7A of the said Acts and one finding that s 39 of the Acts saved the Claimant (appellant).

[5] Dissatisfied with the said decision the respondent (Government of Sarawak) applied to the High Court to set it aside.

[6] The learned High Court judge in a lengthy and erudite judgment allowed the respondent's application. Hence this appeal before us.

FACTS OF CASE

[7] On 5 July 1984, the British architectural firm called Sami Mousawi International ('SMI'), with Sami Mousawi as the principal, and the Malaysian architectural cum engineering firm called Perunding Utama ('PU'), with Abdullah Mohd Noor as the principal, jointly wrote to the Amanah Kebajikan Mesjid Negeri Sarawak ('Lembaga') to propose the provision of comprehensive consultancy services for the design and supervision of a proposed new Sarawak State mosque. It was stated in the proposal:

(1) that SMI would prepare in the United Kingdom the architectural drawings from concept, schematic and outline design to actual tender drawings and specifications as well as the mechanical and engineering ('M&E') report, layout, design and calculations; and

(2) that PU would assist in some of those works and, inter alia, prepared the civil work designs and drawings, cost estimates, structural drawings, M&E detail drawings and specifications and bills of quantities and PU would submit and seek approval of the building plans from all the relevant authorities.

[8] It was also proposed that a legal entity would be formed to enter into the agreement with the Lembaga. The proposal was accepted by the Lembaga. The claimant (appellant) was formed and the consultancy services agreement ('CSA') was executed incorporating the proposal. The claimant and the two directors were not registered nor approved to practise the disciplines covered by the three Acts.

[9] Therein the CSA, the claimant (appellant) described itself as 'a group of Consulting Architects and Engineers of reputable standing and expertise and is able and capable to undertake and provide all the necessary services to effectively and satisfactorily perform and complete the design and supervision of the project' that is the comprehensive design and supervision of the Masjid Negeri Sarawak ('the project').

[10] The final design drawings for the State Mosque (the project) were submitted by Sami Mousawi (an unregistered architect) and Abdullah Mohd Nor (an unregistered engineer) to Pengarah Kerja Raya. The CSA was novated by Lembaga to the Government of Sarawak vide a novation agreement dated 20 November 1984.

FINDINGS OF THE HIGH COURT

[11] In a lengthy and erudite judgment, Ian Chin J had this to say (at p 71 Rekod Rayuan (Bahagian A & B), lines 5–9):

> The arbitrator had completely ignored the evidence, that it was SMI and PU acting through SM and Abdullah Mohd Noor that had submitted plans for approval, that it was the Claimant that had submitted and claimed payment of professional fees.

[12] He added (at pp 71–72, lines 11–14):

> These two persons together hold 100% of the equity of the Claimant. Those evidence completely dispel any doubt SM and Abdullah Mohd Noor had practised the discipline of architect and engineer at a time they were not registered under the relevant Act. Those evidence show beyond doubt that these two persons, whether by themselves or with other professionals, will ultimately be the beneficiaries of the fees for professional services. That is the consequence of the CSA as formed or as performed. In this regard the arbitrator R Talalla Esq was correct in his dissenting view that it was SMI and PU who performed the architectural services through the vehicle of a corporate identity in the name of the Claimant. This learned arbitrator had correctly pointed out that this was in fact the position maintained by the Claimant in their pleading in following words:
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> > 'The Claimant was, at all material times, a corporate vehicle for a joint venture between Messrs Sami Mousawi International ("SMI") and Messrs Perunding Utama ("PU"), purpose of which was to undertake the consultation work for the design and supervision of the Project.'
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> This fact makes the finding of the two arbitrators that the CSA does not require the Claimant to practise or carry on business or take up employment as architects, engineers or quantity surveyors completely untenable since it was their own pleading and therefore their case that the Claimant was formed to undertake the consultation work for the design and supervision of the Project. That is a serious failure to analyse and appraise material and relevant evidence which, following the decision

of *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, justifies the setting aside of the award.

[13] As to whether the claimant was entitled to claim for the professional fees, the learned judge said:

> If SMI and PU or SM and Abdullah Mohd Noor had claimed for the professional fees they would not be entitled since they are not registered under the relevant Acts. Why, then, should the Claimant be entitled to claim for the same fees under the name of the Claimant when not only SMI and PU but SM and Abdullah Mohd Noor and the Claimant were not registered to practice under the relevant Acts? That was the result of the decision of the two arbitrators when they sought to justify their decision by saying that the Claimant was not performing but providing for the services. It is precisely that a corporate entity like the Claimant cannot by themselves perform the services since such can only be performed by individuals that s 7A was enacted to prevent the Claimant from saying that they did not but someone else perform the services. If the argument of the two arbitrators can be upheld it would mean that a corporate entity need never apply for the approval to practise while allowing unregistered persons to practise under its umbrella. This would render s 7A completely useless. Such a result should not be had and I had said so in *PP v Tan Kah* [1993] 1 CLJ 83, at p 84 since it rendered that piece of legislation completely useless. The award was therefore based on a principle of construction which the law does not countenance and thus, on this ground also and on the authority of *Ganda Edible Oils Sdn Bhdv Transgrain BV* [1988] 1 MLJ 428, the award should be set aside.

[14] The learned judge was also of the considered opinion that the award ought also to be set aside on the ground that as a matter of public policy it should not be enforced for it infringed the three Acts or it at least defeat the objective of the three Acts. The authority for this proposition is *David Taylor & Son, Ltd v Barnett* [1953] 1 All ER 843.

[15] Turning to the decision of the other arbitrator R Talalla Esq who though he came to the decision that the CSA infringed the Acts, nevertheless answered the questions in the affirmative, because he felt that the CSA was saved by s 39, the learned judge said:

> The arbitrator had also said that the CSA was impliedly acquiesced or tolerated by His Excellency the Yang DiPertua Negeri or the Government of the State of Sarawak which assuming that it is true, it does not prevent the Respondent from raising the defence of illegality (see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, at p 173). His decision on this point was plainly against the authority and is an error in law which justifies the setting aside of the award (see *Ganda Edible Oils Sdn Bhd)*.
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> As for his reliance on s 39, I am again in agreement with the learned State Attorney-General that the arbitrator had misconstrued the same or proceeded on an interpretation which the law does not countenance. Section 39 merely restates what has already been generally provided by s 127 of the Interpretation Acts 1948 and 1967 which says:
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> > 'No Act of Parliament, Ordinance or Enactment shall in any manner whatsoever affect the rights of the Yang di-Pertuan Agong or of the Government unless it is therein expressly provided, or unless it appears by necessary implication, that the Yang di-Pertuan Agong or the Government, as the case may be, is bound.'

Section 39 also removes any implication that the State Government is bound. However, though it is not bound it does not mean that it cannot take advantage of the Acts (*Bennion on Statutory Interpretation* (2nd Ed), pp 317–318).

MEMORANDUM OF APPEAL

[16] The appellant in his memorandum of appeal raised nine grounds to show that the learned judge had erred in law and/or in fact in coming to the conclusions as stated in his judgment. For ease of reference, they are reproduced below as follows:

(1) The learned judge had erred in law and/or in fact in coming to the conclusion that the learned arbitrators, Dato' VC George, Mr Richard Talalla and the late Mr S Sahathevan had misconducted themselves in granting the award dated 28 February 2000 in favour of the appellant.

(2) The learned judge had erred in fact and/or in law in holding that the learned arbitrators, had made an error in law on the face of the award in corning to the conclusion that the appellant was not practicing as the relevant professionals under the Architects Act 1967, Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967.

(3) The learned judge had erred in law by interfering with the findings of fact arrived at by the learned arbitrators in respect of the evidence adduced at the arbitration proceedings.

(4) The learned judge had erred in fact and/or in law in coming to the conclusion that the learned arbitrators had misconducted themselves by misconstruing the evidence adduced in respect of the parties who made the submission of drawings and plans in respect of the State Mosque Project in particular to the letter dated 15 March 1985 written by Sami Mousawi International and Perunding Utama.

(5) The learned judge had erred in law and/or in fact in coming to the conclusion that the learned arbitrators had misconducted themselves in failing to analyze and appraise the evidence as a whole adduced in respect of the parties who made the submission of drawings and plans in respect of the State Mosque Project.

(6) The learned judge had erred in law and in fact in coming to the conclusion that the learned arbitrators had misconstrued the interpretation of s 39 of the Architects Act 1967 and the corresponding provisions of the Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967.

(7) The learned judge had erred in law and in fact by holding that in view of the evidence adduced at the arbitration proceedings, s 39 of the Architects Act 1967 and the Quantity Surveyors Act 1967 does not preclude the Respondent from raising the defence of illegality in respect of the consultancy services agreement.

(8) The learned judge had erred in law by holding that the award ought to be set aside on the ground that the consultancy services agreement should not be enforced on the ground of public policy for it infringed or defeated

the objectives of the Architects Act 1967, the Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967.

(9) The learned judge had erred in law by failing to appreciate the role of the court in respect of applications to set aside arbitration awards, where the parties have agreed to abide by the decision of an arbitration tribunal of their own selection, being that the court must not be over ready to set aside awards unless there had been something radically wrong and vicious in the proceedings.

SUBMISSIONS

A By learned counsel for the appellant — Mr Ranjit Singh

(i) On grounds (1), (2), (3) and (9):

[17] Mr Ranjit Singh began his submission by stating the general principle of law, that a court may interfere with an award if there exists an error in law on the face of the award; but where a specific question of law arises from the material facts of the case, the court cannot interfere with such a decision, even if erroneous. He said, in the present case, there was no error in law made by the majority of the arbitrators but what the learned judge did was to find errors of fact, which the learned judge was not entitled to do.

(ii) On grounds (4), (5) and (8):

[18] It was submitted for the appellant that the learned judge in disturbing the findings of fact by the arbitrators, erroneously relied on the letter dated 15 March 1985. He said, the majority of the arbitrators found that the appellant did not practise as an architect, engineer or quantity surveyor as envisaged by the relevant Acts and that they came to such a finding after going through both oral and documentary evidence before them. He also said that the letter was consistent with the appellant's stand, that they were not registered, but that the respective persons practicing through whom they were claiming the consultancy fees were.

(iii) On grounds (6) and (7):

[19] It was learned counsel's submission that the learned judge was wrong in coming to the conclusion that the learned arbitrator had misconstrued the interpretation of s 39 of the relevant Acts and that s 39 did not preclude the respondent from raising the defence of illegality in respect of the CSA.

B By Sarawak State Attorney General — Datuk JC Fong

(i) On grounds (1), (2), (3) and (9):

[20] It was Datuk JC Fong's submission that there are two grounds for setting aside the interim order of the arbitrators. Firstly, misconduct and secondly, an error in law on the face of the award. On misconduct, he argued

that the learned judge had on the facts of the case, rightly found that the arbitrators had misconducted themselves by giving an award that was totally against statutory provisions and the public policy reflected therein. He said, the learned judge had also come to the right conclusion by referring to the pleadings that the appellant was formed to undertake consultancy work for the design and supervision of the project. On the error in law, on the face of the award, he said two of the arbitrators had failed to apply the principle that statutes should not be so construed as to make them completely useless and failed to give effect to the intention of Parliament.

(ii) On grounds (4), (5) and (8):

[21] On these two grounds namely (4) and (5), the learned State Attorney-General argued that the judge had not interfered with the findings of fact by the arbitrators. Instead, he said, the learned judge had correctly held that the arbitrators failed to analyse or had completely ignored critical evidence. Firstly, the letter dated 15 March 1985 which clearly showed that it was the appellant and PU, acting through Sami Mousawi & Abdullah bin Mohd Noor, who submitted building plans to Jabatan Kerja Raya for approval. Secondly, there was also admission by Sami Mousawi that neither he, SMI nor the appellant was registered as architect, engineer or quantity surveyor in Malaysia. Lastly, the evidence of Abdullah bin Mohd Noor, who said he was never a registered engineer.

[22] On ground (8), Datuk JC Fong said that the appellant's claim is based on the CSA, which provided that the appellant was to be paid consultancy fees based on the statutory scales of fees for architects, engineers and quantity surveryors.

[23] Finally, it was Datuk JC Fong's submission that the arbitrator's award contains a manifest error in law on the face of the record, as by answering the preliminary issue in the affirmative, it means that the appellant not being an 'Architect', 'Engineer' or 'Quantity Surveyor' can provide comprehensive architectural, engineering and quantity surveying services.

(iii) On grounds (6) & (7):

[24] Datuk JC Fong submitted that the judge had correctly interpreted s 39 of the Acts having regard to s 127 of the Interpretation Acts 1948 and 1967 and that the judge was right in holding that the Arbitrators had proceeded on 'a statutory interpretation that the law does not countenance'.

COURT'S FINDINGS

[25] This is a case where a dispute arose because of a claim by the appellant for outstanding fees and more importantly, a claim for fees which the appellant would have been entitled to if the respondent had not allegedly breached the CSA in or about 1994, by appointing another consultant to undertake the extension to the state mosque. Arising from these claims, the issue whether the appellant could provide the consultancy services arose, as the appellant

admittedly is not a registered architect, engineer or quantity surveyor and had not obtained from the relevant professional regulatory bodies a permit to provide professional services as architect, engineer or quantity surveyor and whether the appellant has any cause of action, based upon breach of contract, having regard to ss 7 and 7A of all the three relevant Acts.

[26] Having examined the arguments by both parties and given them our anxious consideration, it is our unanimous decision, that the learned judge in setting aside the arbitrators' award had not interfered with the findings of fact by the arbitrators. Instead, we are satisfied that he had come to the right conclusion when he said as follows: (at p 72 of the appeal record — Part A & B):

> This fact makes the finding of the two arbitrators that the CSA does not require the Claimant to practise or carry on business or take up employment as architects, engineers or quantity surveyors completely untenable since it was their own pleading and therefore their case that the Claimant was formed 'to undertake the consultation work for the design and supervision of the Project'. That is a serious failure to analyse and appraise material and relevant evidence which, following the decision of *Sharikat Pemborong Pertanian & Perumahan,* justifies the setting aside of the award.

[27] Section 7A of the relevant Acts of Parliament clearly provides that only a body corporate which has a permit from the relevant governing professional bodies can recover 'in any court any fee, charge or remuneration for any professional advice or services.'

[28] Furthermore the prohibition against recovery of fees by an unregistered engineer, architect and quantity surveyor providing professional services and advice under ss 7 and 7A is further strengthened by the provisions of s 34 of the Architects Act 1967, and s 25 of both the Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967 which impose penal sanction on those who breached this prohibition (See bundle of authorities p 14). Section 34 of the Architects Act 1967 provides:

> (1) Any person who contravenes or fails to comply with any of the provisions of this Act or any rules made thereunder shall be guilty of an offence and where no penalty is expressly provided, shall, on conviction, be liable to a fine not exceeding five thousand ringgit or imprisonment for a term not exceeding two years or to both.
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> (2) If a body corporate contravenes or fails to comply with any of the provisions of this Act or any rules made thereunder, every director, manager, secretary or other similar officer thereof shall be guilty of the same offence and be liable to the same penalty as the body corporate is guilty of and liable to, unless he proves that the offence was committed without his knowledge, consent or connivance or was not attributable to any neglect on his part.
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> (Similar provisions are found in s 25 of both the Quantity Surveyors Act 1967 and the Registration of Engineers Act 1967).

[29] We are also in total agreement with the learned judge's finding on the decision of the two arbitrators — when they sought to justify their decision by saying that the claimant was not performing but providing (for the services. This is what the learned judge said: (at p 72 appeal record — Part A & B)

> It is precisely that a corporate entity like the Claimant cannot by themselves perform the services since such can only be performed by individuals that s 7A was

enacted to prevent the Claimant from saying that they did not but someone else perform the services. If the argument of the two arbitrators can be upheld it would mean that a corporate entity need never apply for the approval to practise while allowing unregistered persons to practise under its umbrella. This would render s 7A completely useless.

[30] He added:

The award was therefore based on a principle of construction which the law does not countenance and thus, on this ground also and on the authority of *Ganda Edible Oils Sdn Bhd,* the award should be set aside.

[31] Further, we are also of the same view that such an award by the arbitrators is clearly against the statutory provisions and the public policy which the enactment of such laws aims to achieve, ie to regulate the professions involved and to protect the public from unqualified and unregistered engineers, architects or quantity surveyors.

[32] As regards the decision of the other arbitrator, who though he came to the decision that the CSA infringed the Acts, nevertheless answered the questions in the affirmative because he felt the CSA was saved by s 39, the learned judge said this: (at p 74 of the appeal record Part A & B):

His decision on this point was plainly against the authority and is an error in law which justifies the setting aside of the award (see *Ganda Edible Oils Sdn Bhd*).

[33] As to the learned arbitrator's reliance on s 39, the learned judge had this to say:

I am again in agreement with the learned State Attorney-General that the arbitrator had misconstrued the same and proceeded on an interpretation which the law does not countenance. Section 39 merely restates what has already been generally provided by s127 of the Interpretation Act 1967 ...

Conclusion

[34] For the reasons discussed above, we dismissed the appeal with costs and ordered that the deposit be paid to the respondents.

[35] Our decision was delivered on 9 May 2003 and in the meantime, one member of the panel, Mohd Saari JCA had since retired. The other member of the panel, Abdul Hamid Mohamad JCA has read this judgment in draft and has expressed his agreement with the same.

Appeal dismissed.

Reported by Mariette Peters Goh